

Appellate Court Articulation of General Standards of Conduct: Effective Guidance versus Impotent Verbalism *

ARTHUR WARREN PHELPS †

Speculation has been current concerning the process whereby standards of conduct are articulated by appellate courts. There has been little examination of the case material for the purpose of determining objectively how much of that which is usually included under the heading of articulation is effective in the final disposal of cases. It is strange that this should be true of a system of law, such as the English system, which so definitely associates generality with justice.

The present study has been attempted in order to gain a little insight into how appellate courts give meaning to general standards, and to test, if possible, the effectiveness of opinions in procuring a chosen result. When general standards are used there really is no norm for the matter in question if the "path of words" selected by the appellate courts to animate such standards is no more than impotent verbalizing. It is, therefore, of importance to both judges and lawyers to know how much of that which passes under the name of definition has any true significance.

* This article was written at Columbia University under Professor Karl Llewellyn in a seminar on The Theory of Legal Institutions. The writer wishes to acknowledge his indebtedness to Professor Llewellyn for his valuable criticism of this essay without committing him to approval of any of the views herein expressed.

† Assistant Professor of Law, Ohio Northern University, Ada, Ohio. 1931 A. B. Washington & Lee University; 1932 A. M. Ohio State University; 1935 LL. B. University of Cincinnati; 1940 LL. M. Columbia University.

Although the problem is common to all jurisdictions, the decisions interpreting the California guest statute were for several reasons taken as the subject-matter of investigation. In that state a statute had been passed setting forth a general standard intended by the legislature to produce a certain result. This result was not accomplished because of the way in which the appellate courts handled the problem. There followed a change in the statute which set forth the same standard in different words. This amended statute did procure, at least in part, the result intended by the legislature. From the decisions interpreting the two statutory phrases used to state the standard, valuable information can be secured concerning the way in which appellate courts tend to articulate standards, as well as the way in which they must articulate them to get the results which are sought.

The guest statute was also selected because it contains a relatively simple standard, in dealing with which the judges have a fair chance of understanding the broader implications of what they are doing. In addition the situation is one in which policy elements are of great importance, and the play of public policy and special interests can be seen. Finally, a reasonable number of cases appear in the appellate courts over a comparatively short period of time. This gives sufficient material for useful observations concerning the nature of the judicial process.

It is realized that there are distinct limitations upon the type of study attempted here. Nevertheless, a casual glance at the figures contained in the next two sections cannot fail to be suggestive. New departures for thinking in matters relating to general standards can be found.

DISPOSITION BY THE COURTS OF APPEALS OF CASES
INVOLVING "GROSS NEGLIGENCE"

In 1929 the legislature of California provided that a guest riding in a motor vehicle should have no right of recovery against the owner or driver or person responsible for the operation of the motor vehicle except where the injury to or death of the guest resulted from the intoxication, wilful misconduct, or *gross negligence* of the owner, driver, or person responsible for the operation of the vehicle.¹

Opinions were written in forty cases by the appellate courts of California defining the limits of the phrase "gross negligence."² In five, judgments on motion for nonsuit or directed verdict were appealed.³ One was re-

¹ Krause v. Rarity, 210 Cal. 644, 293 Pac. 62 (1930).

² A number of these cases were decided after the enactment of the amendment eliminating gross negligence from the statute, but they were controlled by the earlier statute. Care, therefore, should be exercised in drawing conclusions.

³ (Compare the following cases with the ones discussed in footnote 9.)

Going upgrade rounding a left curve defendant was momentarily blinded by the sun. Before he could recover his vision his car drew to the left side and into an embankment. It was held that the trial court was justified in holding as a matter of law that the claim of gross negligence was unsupported. Binns v. Standen, 118 Cal. App. 625, 5 P. (2d) 637 (1931).

Car overturned when rear tire blew out. Speed fifty-five miles per hour. Claim that defendant was in depleted physical condition from drinking every night for three or four nights before starting on the trip in question at 4 A. M. No evidence of intoxication on the day of the accident. Waterman v. Liederman, 60 P. (2d) 881 (Cal. App. 1936).

Driving home at 2 A. M. from a basketball game the defendant fell asleep at the wheel and ran into an oncoming automobile. The defendant had no prior indication that he might doze. Action of the trial court in nonsuiting the plaintiff was affirmed. Cooper v. Kellogg, 2 Cal. (2d) 504, 42 P. (2d) 59 (1935); *but see*: Cooper v. Kellogg, 31 P. (2d) 797 (Cal. App. 1934).

As defendant passed a car it turned abruptly to the left. Defendant swerved into soft dirt on the left and overturned. Simpson v. Steinhoff, 21 P. (2d) 960 (Cal. App. 1933).

Automobile was stopped at a crossing to permit a freight train to pass on a side track. After the freight had passed, the defendant drove over the side track and was struck by an approaching train on the main line. Defendant

versed. Of the thirty-five cases tried on the facts, the facts were found by the jury in twenty-three,⁴ by the trial court in twelve.⁵ There were thirty judgments for the plaintiff: nineteen on jury verdicts; eleven on court findings. It is significant that but *three* of these judgments were reversed.⁶ Only one was reversed on the ground that the

looked, but his view was blocked by the outgoing train. He listened but did not hear because of the noise of the freight. The trial court directed a verdict for the defendant. It was held on appeal that the facts constituted a *prima facie* case of gross negligence. *Smellie v. Southern P. Co.*, 287 Pac. 343 (Cal. 1930); 212 Cal. 540, 299 Pac. 529 (1931) (the only judgment of nonsuit reversed).

⁴ *Taylor v. Cockrell*, 116 Cal. App. 596, 3 P. (2d) 16 (1931); *Meighan v. Baker*, 119 Cal. App. 582, 6 P. (2d) 1015 (1932); *O'Neill v. Haynes*, 122 Cal. App. 329, 9 P. (2d) 853 (1932); *Dahl v. Spotts*, 128 Cal. App. 133, 16 P. (2d) 774 (1932); *Anderson v. Ott*, 127 Cal. App. 122, 15 P. (2d) 526 (1932); *Johnson v. Ostrom*, 16 P. (2d) 794 (Cal. App. 1932); *Dodds v. Gifford*, 16 P. (2d) 279 (Cal. App. 1932); *Nelson v. Westergaard*, 130 Cal. App. 79, 19 P. (2d) 867 (1933); *Gardiner v. Hogue*, 131 Cal. App. 254, 20 P. (2d) 957 (1933); *Redwing v. Moncravie*, 21 P. (2d) 986 (Cal. App. 1933); *Walters v. Du Four*, 132 Cal. App. 72, 22 P. (2d) 259 (1933); *Nichols v. Smith*, 28 P. (2d) 693 (Cal. App. 1934); *Smith v. Wagner*, 30 P. (2d) 1020 (Cal. App. 1934); *Johnson v. Johnson*, 137 Cal. App. 701, 31 P. (2d) 237 (1934); *Fenstermacher v. Johnson*, 138 Cal. App. 691, 32 P. (2d) 1106 (1934); *Harlan v. Taylor*, 33 P. (2d) 422 (Cal. App. 1934); *Ohlson v. Frazier*, 2 Cal. App. (2d) 708, 39 P. (2d) 429 (1934); *Rees v. Chase*, 3 Cal. App. (2d) 127, 38 P. (2d) 819 (1934); *De Martini v. Wheatley*, 126 Cal. App. 230, 14 P. (2d) 869 (1932); *Stotts v. Blickle*, 220 Cal. 225, 30 P. (2d) 392, (1934); *Armocost v. Wilberg*, 42 P. (2d) 393 (Cal. App. 1935); *Stoneburner v. Theodoratos*, 30 P. (2d) 1001 (Cal. App. 1934); *Baef v. Kleiber Motor Truck Co.*, 43 P. (2d) 575 (Cal. App. 1935).

⁵ *Malone v. Clemow*, 111 Cal. App. 13, 295 Pac. 70 (1931); *Kastel v. Stieber*, 215 Cal. 37, 8 P. (2d) 474 (1932); *McKinley v. Dalton*, 17 P. (2d) 160 (Cal. App. 1932); *Manica v. Smith*, 18 P. (2d) 117 (Cal. App. 1933), *subsequent opinion*, 33 P. (2d) 418 (1933); *Hagan v. Metzger*, 20 P. (2d) 117 (Cal. App. 1933); *Castro v. Singh*, 131 Cal. App. 106, 21 P. (2d) 169 (1933); *Binford v. Purcell*, 2 Cal. App. (2d) 87, 37 P. (2d) 732 (1934); *Bettencourt v. Oliveria*, 3 Cal. App. (2d) 325, 39 P. (2d) 243 (1934); *Goodwin v. Goodwin*, 5 Cal. App. (2d) 644, 43 P. (2d) 332 (1935); *Sumner v. Edmunds*, 21 P. (2d) 159 (Cal. App. 1933); *Lincoln v. Quick*, 24 P. (2d) 245 (Cal. App. 1933); *Stewart v. Wagenbach*, 47 P. (2d) 267 (Cal. App. 1935).

⁶ *Lincoln v. Quick*, 24 P. (2d) 245 (Cal. App. 1933) [insufficient evidence to show gross negligence]; *Redwing v. Moncravie*, 21 P. (2d) 986 (Cal. App. 1933) [erroneous negligence]; *Nichols v. Smith*, 28 P. (2d) 693 (Cal. App. 1934) [improper injection of insurance and faulty allegation in petition].

evidence was insufficient to show gross negligence. The action of two trial courts in granting motions for a new trial, where the jury found for the plaintiff, was sustained.⁷ There were five judgments for the defendant in the cases tried on the facts: four on jury verdicts; one on court findings.⁸ Motions for a new trial were granted in two of the four cases in which the jury found for the defendant. These rulings were sustained on appeal. The judgments for the defendant in the other three cases were affirmed.

In considering the thirty-five cases tried on the facts, almost every court of appeals stated that the degree of care required under the circumstances was a question of fact for the court or jury and not a question of law. Many of these cases would seem indistinguishable from those of negligence,⁹ assuming, of course, that "gross negligence"

⁷ *Johnson v. Ostrom*, 16 P. (2d) 794 (Cal. App. 1932); *Ohlson v. Frazier*, 2 Cal. App. (2d) 708, 39 P. (2d) 429 (Cal. App. 1934).

⁸ *Stewart v. Wagenback*, 47 P. (2d) 267 (Cal. App. 1935) [only court finding for defendant]; *Armacost v. Wilberg*, 42 P. (2d) 393 (Cal. App. 1935); *Harlan v. Taylor*, 33 P. (2d) 422 (Cal. App. 1934); *Dodds v. Gifford*, 16 P. (2d) 279 (Cal. App. 1932); *Baefv v. Kleiber Motor Truck Co.*, 43 P. (2d) 575 (Cal. App. 1935) [granting of motion for new trial affirmed in last two cases].

⁹ On a clear night while driving from 30 to 35 miles an hour the defendant ran into the back of a parked truck whose red light could be seen for at least 200 feet. The street was straight with no interfering traffic. The defendant had driven from Burbank, California to Oakland in one day. There was no explanation of why she did not see the parked truck. It was held that there was an utter lack of slight care, and since the trial court had determined there was gross negligence "we are powerless to interfere with its conclusions." *Malone v. Clemow*, 111 Cal. App. 13, 295 Pac. 70 (1931).

Defendant travelling in a fog at 25 miles per hour met a car weaving to the wrong side of the road. Defendant swerved to his left to go off the road where he claimed he could see. The other car returned to its right side of the road and a collision resulted. The court held that the evidence was sufficient to show an "entire failure to exercise care—a complete lack of even slight diligence to avoid injuring others." *Goodwin v. Goodwin*, 5 Cal. App. (2d) 644, 43 P. (2d) 332 (1935).

Two public highways crossed a blind intersection. The defendant saw that the car which struck him was farther from the intersection than he was

when set forth in a statute can be something more than a "vituperative epithet."¹⁰ It is clear from an examination of these cases that the courts of appeals either would not or could not articulate the standard of gross negligence beyond the definition established by the Supreme Court of California that gross negligence was "want of slight diligence."¹¹ There had been a judgment for the plaintiff in every case appealed except five. Three judgments for the plaintiff were reversed, only one on the basis of the insufficiency of the facts to show gross negligence. From this it would appear that the standard of "gross negligence" created a juror's paradise in which their notions of liability were supreme.

and speeded up to make a safe crossing. His car was struck near the rear seat. No anxiety was expressed by the plaintiff. It was held that the question was properly one for the jury. *Anderson v. Ott*, 15 P. (2d) 526 (Cal. App. 1932). See also, *De Martini v. Wheatley*, 126 Cal. App. 230, 14 P. (2d) 869 (1932).

Defendant driving 45-50 early in the morning struck a cement base of a railroad signal on a curve. *Meighan v. Baker*, 119 Cal. App. 582, 6 P. (2d) 1015 (1932).

While descending a 13% grade defendant lost control of his car because of defective brakes. He began the descent in second gear but finding this insufficient to hold the vehicle, attempted to shift to low gear. No attempt was made to use the emergency brake. It was held a question for the jury to determine whether the defendant was guilty of gross negligence. *Gardiner v. Hogue*, 131 Cal. App. 254, 20 P. (2d) 957 (1933).

Curve having sixty-six degree angle entered at speed of 50-60 miles an hour. *Smith v. Wagner*, 30 P. (2d) 1020 (1934).

¹⁰ ". . . in the construction of statutes which specifically refer to gross negligence, that phrase is sometimes construed as equivalent to reckless disregard . . ." *RESTATEMENT, TORTS* (1934) §282, special note.

¹¹ *Krause v. Rarity*, 210 Cal. 644, 293 Pac. 62 (1930). The court states: "The term 'gross negligence' has been defined as 'the want of slight diligence,' as an entire failure to exercise care, or to exercise so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'"

A trial court unsuccessfully advanced the theory that the defendant could not be found guilty of gross negligence if he did merely what *an ordinarily inattentive and thoughtless person* would have done in the same or similar situation. *Baef v. Kleiber Motor Truck Co.*, 43 P. (2d) 575 (Cal. App. 1935).

Some of the courts seemed to recognize that jury determination of the existence of gross negligence, uncontrolled by the courts except by broad definition, would cause the new statute to make no practical change in the direction of limiting the liability of owners and drivers (*sotto voce*, insurance companies) to guests. The court in *Meighan v. Baker*, said:

"The term 'gross negligence' is incapable of precise definition and its application and use may in some cases lead to unsatisfactory results, even to the extent of nullifying the limitation of liability contained in the statute."¹²

The courts, nevertheless, did not create any rules to guide *trial courts* in directing verdicts, or even indicate to such courts that their power in this respect, enhanced by the statutory standard, was greater than that customarily exercised in negligence cases.

DISPOSITION BY COURTS OF APPEALS OF CASES INVOLVING "WILFUL MISCONDUCT"

It was soon "apparent to the legislature" that if the courts were not going to assume some responsibility for defining the limits of "gross negligence," further legislation would be necessary in order to procure any appreciable change in the judgments rendered in guest cases. The California guest statute was therefore amended in August, 1931, by removing the words "gross negligence" from the statutory definition. This made it necessary for a guest to prove, before he could recover, that he was injured by the *wilful misconduct* of the defendant.¹³

Up to and including volume 111 of the Pacific Reporter, second series (1941), sixty-three cases were found deal-

¹² *Meighan v. Baker*, 119 Cal. App. 582, 6 P. (2d) 1015 (1932).

¹³ *Howard v. Howard*, 132 Cal. App. 124, 22 P. (2d) 279 (1933).

ing directly with the question of wilful misconduct. In eleven, directed verdicts or motions of nonsuit had been granted.¹⁴ Five of these determinations were reversed by the appellate courts, on the ground that the facts were for the jury. Reversal occurred in all three appeals perfected from judgments on demurrer.¹⁵

In the remaining forty-nine cases the facts had been found; by the jury in twenty-seven instances, and by the trial court in twenty-two. Thirty-eight judgments were for the plaintiff: twenty-one on jury verdicts;¹⁶ seven-

¹⁴ Nonsuits affirmed: *Forsman v. Colton*, 136 Cal. App. 97, 28 P. (2d) 429 (1933); *Squiar v. McLean*, 39 P. (2d) 437 (Cal. App. 1934); *Horn v. Volko*, 57 P. (2d) 175 (Cal. App. 1936); *Hall v. Mazzei*, 57 P. (2d) 948 (Cal. App. 1936); *McCann v. Hoffman*, 62 P. (2d) 401 (Cal. App. 1936), *aff'd* 70 P. (2d) 909 (Cal. 1937); *Shipp v. Lough*, 41 Cal. App. (2d) 820, 107 P. (2d) 661 (1940).

Nonsuits reversed: *Gieselman v. Uhlman*, 45 P. (2d) 819 (Cal. App. 1935); *Gimnez v. Rissen*, 55 P. (2d) 292 (Cal. App. 1936); *Frank v. Myers*, 60 P. (2d) 144 (Cal. App. 1936); *Erickson v. Vogt*, 80 P. (2d) 533 (Cal. App. 1938); *Marchi v. Virone*, 42 Cal. App. (2d) 124, 108 P. (2d) 469 (1941).

¹⁵ *Weber v. Pinyan*, 61 P. (2d) 954 (Cal. App. 1936); *Friswold v. Leahy*, 60 P. (2d) 151 (Cal. App. 1936); *Morris v. Duncan*, 58 P. (2d) 669 (Cal. App. 1936).

¹⁶ Jury verdicts for plaintiff which were affirmed: *Gibson v. Easley*, 30 P. (2d) 70 (Cal. App. 1934); *Olson v. Gay*, 135 Cal. App. 726, 27 P. (2d) 922 (1934); *Sanford v. Grady*, 36 P. (2d) 652 (Cal. App. 1934); *modified*, 37 P. (2d) 475 (Cal. App. 1934); *Browne v. Ferrandez*, 140 Cal. App. 689, 36 P. (2d) 122 (1934); *Walling v. Rugen*, 3 Cal. App. (2d) 471, 39 P. (2d) 827 (1935); *Edwards v. Bodenhamer*, 46 P. (2d) 202 (Cal. App. 1935); *Candini v. Hiatt*, 50 P. (2d) 843 (Cal. App. 1935); *Collins v. Nelson*, 61 P. (2d) 479 (Cal. App. 1936); *Petersen v. Petersen*, 67 P. (2d) 759 (Cal. App. 1937); *Chandler v. Quinlan*, 78 P. (2d) 235 (Cal. App. 1938); *Wright v. Sellers*, 78 P. (2d) 209 (Cal. App. 1938); *Francesconi v. Belluomini*, 83 P. (2d) 298 (Cal. App. 1938); *Madsen v. Cawthorne*, 85 P. (2d) 909 (Cal. App. 1938); *Hass v. Jones*, 29 Cal. App. (2d) 650, 85 P. (2d) 579 (1938); *Hoffart v. Southern Pacific Co.*, 92 P. (2d) 436 (Cal. App. 1939).

Jury verdicts for plaintiff which were reversed: *Lennon v. Woodbury*, 3 Cal. App. (2d) 595, 40 P. (2d) 292 (1935); *Sparrer v. Kersgard*, 85 P. (2d) 449 (Cal. 1938); *Rode v. Roberts*, 54 P. (2d) 498 (Cal. App. 1936); *McLeod v. Dutton*, 57 P. (2d) 189 (Cal. App. 1936); *Halter v. Malone*, 53 P. (2d) 374 (Cal. App. 1935).

Reversed for error in charge: *Walker v. Bacon*, 132 Cal. App. 625, 23 P. (2d) 520 (1933).

teen on court findings.¹⁷ Seventeen of these judgments were reversed. Eleven of the court findings and five of the jury verdicts were reversed because of the insufficiency of the evidence to show wilful misconduct. The other reversal was for error in the court's charge to the jury. There were eleven judgments for the defendant: six on jury verdicts;¹⁸ five on court findings.¹⁹ Motions for a new trial were granted in two of the six cases in which the jury had found a verdict for the defendant; these rulings were sustained on appeal. In the other cases the judgments for the defendant were affirmed.

There were, then, twenty-two rulings which, either by

¹⁷ Court findings for plaintiff which were affirmed: *Norton v. Puter*, 138 Cal. App. 253, 32 P. (2d) 172 (1934); *Barcroft v. Adkins*, 44 P. (2d) 379 (Cal. App. 1935); *Parsons v. Fuller*, 66 P. (2d) 430 (Cal. App. 1937); *Jones v. Hathway*, 70 P. (2d) 681 (Cal. App. 1937); *Haggland v. Nelson*, 73 P. (2d) 265 (Cal. App. 1937); *Rawlins v. Lory*, 111 P. (2d) 973 (Cal. App. 1941).

Court findings for plaintiff which were reversed: *Howard v. Howard*, 22 P. (2d) 279 (Cal. App. 1933); *Turner v. Standard Oil Co.*, 134 Cal. App. 622, 25 P. (2d) 988 (1933); *Horning v. Gerlach*, 139 Cal. App. 470, 34 P. (2d) 504 (1934); *Crawford v. Herzog*, 40 P. (2d) 954 (Cal. App. 1935); *Ceikin v. Goldman*, 42 P. (2d) 719 (Cal. App. 1935); *Meek v. Fowler*, 35 P. (2d) 410 (Cal. App. 1934), *rev'd* 45 P. (2d) 194 (Cal. 1935); *Weir v. Lukes*, 56 P. (2d) 987 (Cal. App. 1936); *Bartlett v. Jackson*, 56 P. (2d) 1298 (Cal. App. 1936); *Porter v. Hofman*, 78 P. (2d) 1025 (Cal. App. 1938), *rev'd* 85 P. (2d) 447 (Cal. 1938); *Stacey v. Hayes*, 88 P. (2d) 165 (Cal. App. 1939); *Spencer v. Scott*, 39 Cal. App. (2d) 109, 102 P. (2d) 554 (1940).

¹⁸ *Newman v. Solt*, 47 P. (2d) 289 (Cal. App. 1935); *Rhodes v. Studley*, 59 P. (2d) 1082 (Cal. App. 1936); *Robertson v. Brown*, 99 P. (2d) 288 (Cal. App. 1940); *Berryman v. Quinlan*, 29 Cal. App. (2d) 608, 85 P. (2d) 202 (1938); *Fisher v. Zimmerman*, 73 P. (2d) 1243 (Cal. App. 1937). In the last two cases motions for a new trial were affirmed.

In *Broome v. Horn Valley Packing Co.*, 44 P. (2d) 430 (Cal. App. 1935) there was no finding with respect to the defendant driver and a verdict of \$5,000 against the defendant corporation! This was affirmed.

¹⁹ Do these figures suggest that a large proportion of guest cases are being tried by courts and that the resulting judgments for defendants are not thereby measurably increased? The five findings, all affirmed, were: *Medberry v. Olcovich*, 59 P. (2d) 551 (Cal. App. 1936); *Huddleston v. Pound*, 68 P. (2d) 376 (Cal. App. 1937); *Illingsworth v. Boyd*, 36 P. (2d) 659 (Cal. App. 1934); *Del Bosque v. Kakoo Singh*, 65 P. (2d) 951 (Cal. App. 1937); *Volat v. Tucker*, 49 P. (2d) 337 (Cal. App. 1937).

the direction of a verdict sustained in the appellate court, or by a finding of insufficient evidence to show wilful misconduct, declared that certain facts did not constitute wilful misconduct. When this number is compared with the five similar holdings in the cases on gross negligence, it is clear that the legislature did accomplish a change in the final result of guest cases by amending the statute. The appellate courts recognized that their function went beyond the mere creation of a definition to guide the jury and called for the judicious exercise of their power to declare the facts insufficient to show wilful misconduct.²⁰

THE RESPONSIBILITY FOR ARTICULATING STANDARDS

When the California legislature altered its guest statute to make "wilful misconduct" the important phrase, the result sought to be accomplished in the final disposition of cases was exactly the same as it was when the statute read "gross negligence." Justice Andrews said:

"The legislative sense of fair play seems to have been shocked by the perverted use of the law of negligence in guest cases to recover indirectly against insurance companies by suits against indifferent and irresponsible hosts; in some being a conspiracy between guest and host against the insurance carrier."²¹

²⁰ In this connection it is interesting and important to observe the freedom with which judgments on findings of trial courts were reversed because of the insufficiency of the evidence to show "wilful misconduct" as compared with judgments on the verdicts of juries. Judgments on eleven findings by trial courts were reversed as compared with only five on jury verdicts. The number is approximately the same in both situations if the motions for nonsuit which were affirmed are added to the jury verdicts which were reversed for the insufficiency of the evidence. But this does not seem an entirely satisfactory explanation of the deference accorded jury verdicts in such cases.

²¹ Walker v. Bacon, 132 Cal. App. 625, 23 P. (2d) 520 (1933).

"The Legislature . . . evidently had in mind the redress of an obvious wrong, to wit, the readiness with which both driver and guest would pool issues to exact tribute from an insurance company." Rocha v. Hulen, 44 P. (2d) 478, 482. See also: Walker v. Adamson, 62 P. (2d) 199 (1936) at p. 201.

Some of the courts recognized from their experience with "gross negligence" that mere definition of "wilful misconduct," unaccompanied by further court action, would never accomplish the change which was sought. If the matter should still be one entirely for the jury, as gross negligence has been interpreted to be, then negligence, gross negligence, and wilful misconduct would all be approximately the same thing so far as host liability to guests was concerned. Whatever the phrase chosen, and whatever the definition given to this phrase by the courts, the jury would continue to be plaintiff-minded. The problem facing the courts was to determine what further court action could be used which would produce the results intended by the enactment of the guest statute.

The simple, age-old expedient of declaring that the evidence was insufficient to support a finding of "wilful misconduct" was seized upon by the appellate courts to remove clear cases from the control of the fact-finding body. This did not occur, however, without serious objections. Mr. Justice Sewell dissenting in the case of *Sparrer v. Kersgard*, said:

"To prevent the jury following what would seem to be a natural interpretation of the statute in the mind of the average man it becomes necessary in this case, and it will be necessary in others, to direct a verdict for the defendant or reverse the findings of the jury in practically every case in which wilful misconduct is an issue."²²

²² *Sparrer v. Kersgard*, 85 P. (2d) 449, 452 (Cal. 1938).

Notice also Mr. Justice Wood's dissent in *Halter v. Malone* where he says: "The Constitution assigns to the Legislature the duty of enacting the laws and to the jury the duty of passing upon the facts. The words 'wilful' and 'misconduct' are simple and are well understood by the citizenry. The Legislature would have provided an explanation of qualification of their use if such had been deemed necessary. Manifestly the Legislature intended that the jury in each case should determine what conduct on the part of a driver constitutes wilful misconduct . . . By a reversal of the judgment the court substitutes its own views of the evidence for that of the jury."

Mr. Sewell could see clearly that an unconscionable burden of cases would fall upon the appellate courts were they to attempt to control the meaning of "wilful misconduct" by removing certain cases from the consideration of the jury. Each new fact situation would call for an appellate court determination of whether or not the facts could constitute "wilful misconduct." This unquestionably would be true unless the appellate courts should be willing to relinquish some of their power to trial courts. The issue, then, was between those courts which, believing neither "gross negligence" nor "wilful misconduct" to be capable of exact definition, held that the matter should be left to the jury,²³ and the courts which believed that judicious direction of verdicts could accomplish the purpose intended by the legislature.²⁴ Who has the responsibility for

²³ "How much care will, in a given case, relieve a party from the imputation of gross negligence or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances which the law cannot exactly define." *Meighan v. Baker*, 119 Cal. App. 582, 6 P. (2d) 1013 (1932).

"If we attempt too close an analysis, we find ourselves enmeshed in metaphysics, psychiatry, psychology, and the thousand and one allied mazes of mental speculation." *Manica v. Smith*, 18 P. (2d) 347 (Cal. App. 1933).

"The distinction which some courts have attempted to draw between gross negligence and wilful misconduct shades into faint lines. It seems absurd to say that a person who wills to assume an obvious hazard is not guilty of wilful misconduct. Certainly laymen are not able to see the fine distinctions which courts are able to find by the aid of the judicial microscope." Mr. Justice Sewell dissenting in *Sparrer v. Kersgard*, 85 P. (2d) 449, 452 (Cal. 1938).

"Numerous attempts have been made to define 'wilful misconduct' without any definitely satisfactory result." Mr. Justice Marks concurring in *Walker v. Bacon*, 132 Cal. App. 625, 23 P. (2d) 520 (1933).

²⁴ *Sparrer v. Kersgard*, 85 P. (2d) 449 (Cal. 1938); *Seikin v. Goldman*, 42 P. (2d) 719 (Cal. App. 1935).

"Two main problems were presented to the courts under said section. The first was to arrive at a satisfactory definition of the term 'wilful misconduct' as used therein. The second was to apply such definition to the facts and to determine whether the evidence was sufficient to sustain a finding of wilful

articulating standards may make a great deal of difference. The mere fact that verbal articulation is accomplished by a reviewing court in a long opinion does not mean very much. The important question is, who guides the final disposition of the case? This seems rarely to result from mere definition by appellate tribunals of the constituent elements of "gross negligence" or "wilful misconduct." They do not assume much responsibility for decisions unless in their administrative capacity they make their definitions effective by the actual disposal of some of the cases clearly not involving the elements required by the accepted definitions.

Yet many appellate courts failed to realize that verbal definition was not their only recourse in guiding trial judges, that by more careful tactics their handling of appeals could assume a plan or pattern which would be of specific definitive significance. Such a pattern could develop in the trial courts a sense of inclusion and exclusion—a neat sense of factual discrimination. This seems to have been in the mind of the Supreme Court in the case of *Porter v. Hofman*,²³ where it grouped and approved of the decisions reached in a number of cases decided by different courts of appeals.

A new conception of the purpose of definition, and of the coördinate responsibility of appellate and trial courts, may be taking form in the California cases dealing with "wilful misconduct." Some courts of appeals now see

misconduct as opposed to mere negligence or even gross negligence. Neither problem was free from difficulty."

"While it is true that each case must be determined on its particular facts, it is necessarily true that wilful misconduct requires proof of conduct much more reckless and flagrant than that which would constitute mere carelessness or negligence . . . otherwise there would be no occasion for the adoption of section 403 of the vehicle code." *Spencer v. Scott*, 39 Cal. App. (2d) 109, 102 P. (2d) 554, 556 (1940).

²³ *Porter v. Hofman*, 85 P. (2d) 447 (Cal. 1938).

that definition to be effective must be directed not to the jury, or the fact-finder, but to the trial court in its administrative capacity. They see, further, that definition should be supplemented by appellate-court approval of factual situations which can guide trial courts in developing the factual discrimination necessary for the delicate task of articulating general standards. At least the framework has been constructed in California for inducing responsibility on the part of trial courts. What will be the final outcome only the cases decided in the future can reveal.²⁶

INSURANCE

All of the internal evidence in connection with guest cases points to the conclusion that jurors are cognizant of the fact that in most of these cases the real defendant is an insurance company. An interesting bit of direct evidence of this fact was observed in the case of *O'Nellion v. Haynes*,²⁷ where the plaintiff had suffered a paralysis of half of the body. There one of the jurors propounded the question, "you carry liability insurance don't you?" Before his counsel could object to the question, the defendant answered, "I do." Although the jury was thoroughly admonished by the court not to take the fact of insurance into consideration, their verdict was for \$25,000. It was held by the appellate court that insurance was injected into the

²⁶ There seem to be fewer cases decided by the appellate courts on "wilful misconduct" in the last few volumes of the reports. This might indicate that trial courts are directing verdicts in appropriate cases. The chances are, however, that the gains made will not be consolidated.

In cases involving gross negligence the rulings of the trial courts granting motions for nonsuit were affirmed in four out of five cases involving such motions. In wilful misconduct cases only six out of eleven of these judgments were affirmed. This does not show any greater reliance on trial courts in wilful misconduct cases than in gross negligence cases.

²⁷ *O'Nellion v. Haynes*, 122 Cal. App. 329, 9 P. (2d) 853 (1932). See also: *Godfrey v. Brown*, 29 P. (2d) 165 (1934).

case through no fault of counsel; and, since the verdict was not excessive, the judgment should be affirmed.

It has already been shown that the "plaintiff-mindedness" of the jury has been counteracted to some extent by the action of the appellate courts in holding, in many cases, that the evidence was insufficient to show "wilful misconduct." But in spite of this headway toward securing the result sought by the legislature in the enactment of the guest statute, other elements appear in the California cases which make it questionable whether improper liability is not still visited upon insurance companies. Thus, in clarifying the meaning of "wilful misconduct," the courts gradually emphasized certain facts which if present with any one or more of variety of other facts constituted "wilful misconduct." Remonstrances on the part of the guest concerning a course of conduct which later resulted in injury to the guest is an illustration of one of these facts. Where such remonstrances were shown coupled with such other facts as speed, or sleepiness, or the like, the appellate courts would say the facts were sufficient to show "wilful misconduct."

Professor Bohlen has pointed out the danger involved in relative definite standards of conduct.

"The second danger is that, in its endeavor to protect defendants from the prejudice of juries, the court must by its decisions fix standards of conduct so definite and precise as to give to unscrupulous practitioners extraordinary opportunities for the successful coaching of their witnesses."²⁸

There is little question that the testimony in the cases studied revealed an astute understanding by witnesses of the requirements necessary to sustain a showing of "wilful misconduct." For instance, there was scarcely a single case in which violent remonstrances by the guests did not

²⁸ BOHLEN, *STUDIES IN THE LAW OF TORTS* (1926) p. 601.

appear. In addition, collusion between host and guest was perfectly apparent—almost undisguised. Where this collusion existed, the testimony of the defendant showed a clear understanding of the factors involved in "wilful misconduct."²⁹ Many cases said, significantly, "The facts are not in dispute."³⁰

²⁹ In *Meek v. Fowler*, 45 P. (2d) 194 (Cal. 1935), 35 P. (2d) 410 (Cal. App. 1934) the plaintiff (the defendant's sweetheart) had signed a written statement just after the accident to the effect that the defendant was traveling from 25 to 30 miles an hour and did his best to avoid the accident. At the trial the plaintiff testified at variance to these statements. She attempted to explain the written statements by saying she desired to protect the defendant from a manslaughter charge in the event she died. Another guest testified that he had told the defendant to "take it easy" but he had nevertheless entered the intersection between 40 and 50 miles an hour. A written statement signed by this witness was received in evidence. It stated the speed of the defendant on entering the intersection to be from 15 to 20 miles an hour.

In *Frank v. Myers*, 60 P. (2d) 144 (1936) the defendant said she realized that her conduct would probably result in injury to herself and guest and that the accident was her fault. The trial court directed a verdict for the defendant in this case probably sensing the unreliability of the defendant's testimony. The case was reversed by the Court of Appeals and the question was said to be one for the jury.

In *Wright v. Sellers*, 78 P. (2d) 209 (Cal. App. 1936) the defendant testified when asked if the plaintiff said anything: "Just prior to the accident he asked me to slow down." Also "... I was going down a slight grade traveling about sixty miles an hour between sixty and sixty-five." When asked why he could not make the turn he said he was going "too fast."

In *Walker v. Bacon*, 132 Cal. App. 625, 23 P. (2d) 520 (1933) both parties were injured and neither was able to tell what happened. The defendant described the road as having a high center, and narrow, with deep ditches on either side. The defendant admitted he would not ordinarily drive over it in excess of forty miles an hour, but he was driving around sixty. He also testified the speedometer registered about ten per cent slow. The defendant's son testified the steering knuckle of the car was *very badly worn* and that he had told his father about this *twice*.

See also: *Collins v. Nelson*, 61 P. (2d) 479 (1936) at p. 482.

³⁰ "The facts are not in dispute." *Porter v. Hofman*, 85 P. (2d) 447, 448 (Cal. 1938). "There seems to be little dispute as to the facts of the case." *Chandler v. Quinlan*, 78 P. (2d) 235, 235 (Cal. App. 1938). "The facts of the case are not in serious dispute, except as to a few details." *Wright v. Sellers*, 78 P. (2d) 209 (Cal. App. 1938).

SELECTION OF FACTS IN THE ARTICULATION OF
STANDARDS

The theory was stated in several cases that where there was substantial evidence to support the finding or verdict in the trial court, it was unnecessary for the court of appeals to set forth the facts of the case in rendering its opinion.³¹ This theory exhibits a common notion concerning the function of a court of appeals with respect to the evidence when articulating standards. Its duty is considered as merely supervisory; the importance of the facts in connection with future cases is overlooked. The court in *Koeberle v. Hotchkiss* says:

"To thresh through a reporter's transcript, and to then determine whether or not there is any substantial evidence, requires no more skill than to thresh through a transcript and determine on which side lies the greater weight of evidence. . . . It required a somewhat lively imagination the first time the appellate court declared that the search for and the determination whether there was any evidence to support a finding was the determination of a question of law. . . . We are attempting to point out how nearly this so-called 'question of law' approaches to being a question of fact. All of this is in line with the thesis of this paragraph that this court purposely refrains from setting out the facts and circumstances in evidence upon which it bases its statements that there is substantial evidence to support the implied findings of the jury."³²

If, as the court says, deciding whether there is sufficient evidence to support a verdict or finding does approach a question of fact, it would seem of great importance that the facts upon which the court of appeals bases its opinion should be stated. Suppose, for instance, that court should say that driving at a high speed on a mountain road in the

³¹ *Volat v. Tucker*, 49 P. (2d) 337 (Cal. App. 1935); *Edwards v. Bodenhamer*, 46 P. (2d) 202 (Cal. App. 1935); *Medberry v. Olcovich*, 59 P. (2d) 551 (Cal. App. 1936).

³² *Koeberle v. Hotchkiss*, 43 P. (2d) 104, 106 (Cal. App. 1935).

face of remonstrances by guests furnished sufficient evidence of wilful misconduct to send the case to the jury. The "elemental" facts do aid later courts in determining the limits of the doctrine of wilful misconduct.

If, as these courts seemed to think, there is no necessity for a statement of the facts upon which the appellate decision is based, why did they write opinions? The verbal definition of the phrase "wilful misconduct" was well settled at the time, and yet the opinions consisted entirely of definitional quotations from earlier leading cases. The court in the *Hotchkiss* case goes on to say:

"Such a recitation of the evidence makes the same a part of the case law, much to the confusion of professors in law schools, their pupils, and others. Such practice takes time and makes for long opinions when brevity in opinions is demanded as a cardinal virtue second only to clearness."³³

The confusion which this court says arises from a recitation of the evidence is a confusion which comes when several decisions are compared, some holding the question to be one for the jury, others holding approximately the same question to be one for a nonsuit or a directed verdict. This comparison of facts brings the realization that what is in reality a different standard is being applied in different courts. No plan or pattern for the cases is observable. The absence of a plan is probably due to the lack of any uniform thought among appellate courts with respect to the standard which is being defined. The neat sense of factual discrimination necessary to articulate broad standards is absent.

Where, however, the trial court has directed a verdict for the defendant, and the court of appeals reverses this judgment, then the judge who wrote the opinion in the

³³ *Supra* note 32 at p. 106.

Hotchkiss case thinks the facts should be stated in the opinion of the court of appeals. This judge said, in a subsequent case:

"We have reviewed the record and believe the plaintiff's contention should be sustained and the judgment reversed. Because we believe the judgment should be reversed, we shall set forth the facts and circumstances in evidence somewhat in detail (a task which the writer of this opinion ordinarily does not deem necessary or efficient where the judgment of the trial court is to be affirmed)." ³⁴

This position seems inconsistent with that taken in the *Hotchkiss* case. The action of the court in both cases consists of a holding that the question is one for the jury. So far as future cases are concerned the need for a recitation of the facts is no greater in the one than in the other.

Not only are some of the reviewing courts reluctant to state the facts where they hold that there is evidence sufficient to sustain a finding of wilful misconduct, but they also refuse to consider the facts of other cases in which a like result was reached. In several instances counsel, recognizing the importance of facts, made an extensive review of the cases involving wilful misconduct, pointing out the general factual similarities between the cases before the court and the cases already decided. Yet several appellate courts refused to place any weight upon such a review of the cases.³⁵ The court in *McCann v. Hoffman* said:

"It would serve no useful purpose to review the facts in the cited cases or other cases on this subject, as it has been frequently stated that each case must stand upon the particular facts involved therein."

³⁴ *Gieselman v. Uhlman*, 45 P. (2d) 819, 819 (Cal. App. 1935).

³⁵ "It must be borne in mind, of course, that the interpretation to be given actions and conduct must turn on the circumstances of the individual case, and that decisions passing upon facts constituting or failing to constitute, wilful misconduct, can be of little assistance, other than to announce the definition of that term." *Medberry v. Olcovich*, 59 P. (2d) 551, 553 (Cal. App. 1936).

But this same court found its thinking inescapably connected with previous decisions, for it concluded the above quotation by saying:

"We may state, however, that the showing made here was not as strong as that made in *McLeod v. Dutton, supra*, in which this court reversed a judgment in favor of the plaintiff."³⁶

The Supreme Court of California, as already pointed out, felt it necessary to explain the cases which had held that the evidence warranted a finding of wilful misconduct. Attempting in *Porter v. Hofman* to fit the case before it into the pattern of prior determinations dealing with the problem, it reasoned:

"There is here no conscious reckless disregard of their safety as was involved in cases such as those relied upon by the plaintiffs . . . and which led to the conclusion therein that the evidence warranted a finding that wilful misconduct had occurred."

The whole picture is filled out when the court continues:

"Similarly in other cases, some of which are cited below, the facts failed to reveal misconduct on the part of defendants within the meaning of the approved definition and the courts unhesitatingly reversed judgments or orders favorable to the plaintiffs therein."³⁷

In making a selection of the cases decided by the courts of appeals and placing them in two distinct classes, the Supreme Court made it easier for *trial courts* to make the factual discrimination necessary in deciding whether the facts showed wilful misconduct when viewed most favorably toward the plaintiff.³⁸

³⁶ 62 P. (2d) 401, 402 (Cal. App. 1936), *aff'd* 70 P. (2d) 909 (Cal. 1937).

³⁷ 85 P. (2d) 447, 449 (Cal. 1938).

³⁸ In *Parsons v. Fuller*, 66 P. (2d) 430, 431 (Cal. 1937) the Supreme Court said: "A reading of the present opinion of the District Court of Appeals we think will show an entirely different course of conduct on the part of the defendant in this case and that his acts persisted in for some hours and over many miles of travel, after repeated protests on the part of his guest, and while they were traveling over a mountain road with frequent curves and at

If appellate courts treat the question before them as substantially similar to the action of a trial court in directing a verdict, no progress will be made toward defining a standard such as wilful misconduct. The act of directing a verdict and that of determining on appeal whether there is substantial evidence in the record to support a verdict are analogous.³⁹ But directing a verdict does not have the great normative significance which attaches to the act of an appellate court in determining the sufficiency of the evidence. This difference is frequently overlooked.

Even if this distinction be clearly recognized by the appellate courts, other obstacles remain in the path of a proper selection of facts for their articulation of standards. Thus it cannot be said that they always have a correct mental picture of the facts as they were presented in the trial court. In *Hoffart v. Southern Pacific Co.*,⁴⁰ the court of appeals had to admit that it had misread the record to the extent that it pictured a truck approaching a crossing on a road paralleling the railroad tracks, when as a matter of fact the road ran at a distinct angle to the tracks. The court nevertheless felt that this misconstruction of the evidence was inconsequential.

an excessive rate of speed, compel the conclusion that he was guilty of wilful misconduct within the settled meaning of that term as defined by the authorities, many of which are cited in said opinion."

This type of opinion has been copied in other cases. *Spencer v. Scott*, 39 Cal. App. (2d) 109, 102 P. (2d) 554 (1940); *Shipp v. Lough*, 41 Cal. App. (2d) 820, 107 P. (2d) 661 (1940).

³⁹ *Collins v. Nelson*, 61 P. (2d) 479 (Cal. App. 1936).

⁴⁰ 92 P. (2d) 436 (Cal. App. 1939). In the petition for rehearing, page 444, the court said: "We stated that the road which was traversed by the truck paralleled the railroad and then turned to the right and crossed the track. The record shows that the road does not run parallel to the track, but approaches the track in a straight line at an angle of 40 degree. The state highway parallels the railroad on the opposite side of the track. It would appear, however, that the inaccuracy mentioned was more favorable to appellants than the correction which we here make."

A more substantial change in the facts was made on a rehearing in *Sanford v. Grady*.⁴¹ Here the court had said, "Richard Steger was familiar with this road and knew of the depression therein." On rehearing the following was added by the court, "although he had not traveled that road for four years he claimed that he did not remember the exact location of the depression. He said in that regard, 'I did not know it was so close.'" The court also had stated, "There is no doubt that with knowledge on his part of the presence of the declivity in the roadway . . . he deliberately attempted to pass the truck in reckless disregard of the safety of his passenger." On rehearing the words, "of the presence of" were taken out and in lieu thereof was added, "that he was in the vicinity." Yet, if this had been the appellate court's first impression of the facts its holding might have been substantially different.

There is also exhibited great difficulty in fairly reviewing the record. A dissenting judge will give a different statement of the evidence or will emphasize evidence that other judges think of little importance.⁴² Also, the court of appeals will select certain facts as the salient ones, while the Supreme Court will emphasize others. Where a car traveling down a six per cent grade at forty-five miles an hour on a wet slippery pavement had previously skidded, and thereafter an accident occurred when the driver turned and looked at persons in the back seat of the car, a court of appeals held there was sufficient evidence to support a

⁴¹ 36 P. (2d) 652 (Cal. App. 1934), *Modified on reargument*, 37 P. (2d) 475 (Cal. App. 1934). See also, *Spencer v. Scott*, 39 Cal. App. (2d) 109, 102 P. (2d) 554, 557 (1940) where the court when it rendered its opinion thought the vehicle ahead was a bus whereas on the petition for rehearing the court had to state it was not a bus but an automobile.

⁴² *Meek v. Fowler*, 35 P. (2d) 410, 521 (Cal. App. 1934).

"In order to make my position clear, it is necessary to further review some of the facts of the case which are not particularly emphasized in the opinion of my associate." *Walker v. Bacon*, 132 Cal. App. 625, 23 P. (2d) 520 (1933).

finding of wilful misconduct.⁴³ Yet the Supreme Court reversed the judgment, holding that the facts fell far short of evidencing wilful misconduct. In its view: "The car skidded slightly twice on the wet pavement but apparently not dangerously . . ."; "There is no evidence that at any time the speed of the car exceeded 45 miles an hour . . ."; and "It was in evidence that similar accidents on that part of the road were not unusual, eight having occurred in the six weeks preceding the accident involved, and a number prior to that period."⁴⁴

CONCLUSION

A tentative conclusion upon the evidence presented by the cases studied is that fact-finding bodies, be they juries or trial courts,⁴⁵ do not follow appellate court definitions intended for their guidance in applying, to the facts before them, general standards of law. They are inclined, rather, to apply their own notions of justice. If this is true, one of the causes of the successful emasculation of trial courts during the last century can be understood.⁴⁶ The willing-

⁴³ *Porter v. Hofman*, 78 P. (2d) 1023 (Cal. App. 1938).

⁴⁴ *Porter v. Hofman*, 85 P. (2d) 447, 448 (Cal. 1938).

⁴⁵ When "gross negligence" was the standard, notice that there was only one finding for the defendant by the trial courts, but there were four jury verdicts for the defendant. Also of interest is the fact that when "wilful misconduct" was made the standard there were six verdicts by the jury for the defendant as compared with five findings by the court for the defendant. Finally, notice that in cases dealing with "wilful misconduct" five jury verdicts were reversed because of the insufficiency of the evidence, while eleven court findings were reversed on this ground. This evidence taken together seems of value.

⁴⁶ "With few exceptions, practically every change in trial procedure in America during the nineteenth century meant more and more determination by the jury and less and less control by the trial judge, and in so far as trial courts in most states are concerned it probably is still true that juries exercise a dominant power in those cases in which they participate except in so far as trial judges exercise power by the grace of appellate courts." GREEN, JUDGE AND JURY (1930) p. 379.

ness of appellate courts to rely upon mere definition directed to the fact-finder, unsupplemented by rules guiding trial courts in directing verdicts, has removed almost every vestige of trial-court control over the development of general standards. Where the standard to be articulated is simple and expressive of the common opinion of mankind, no great harm may result. The jury would normally reach the result required by the standard in question. Where, however, the standard diverges from this common opinion,⁴⁷ or is technical or complicated, the authority of the trial court must be reinstated or appellate courts must carry an extremely heavy load of cases.⁴⁸

One of the most striking things observed in the cases studied was the ease with which a fairly comprehensive definition was settled upon in the early decisions, to be reiterated in succeeding cases.⁴⁹ The ridiculous reliance of courts upon definitions is illustrated by one case in which seventy folios of typewritten manuscript were required for

⁴⁷ In *Broome v. Kern Valley Packing Co.*, 44 P. (2d) 430 (Cal. App. 1935) the jury failed to find against the defendant driver, but brought in a verdict of \$5,000 against the defendant corporation. It was argued that the verdict was "self-stultifying and inconsistent." The court affirmed the judgment, saying, "There is no good reason why a failure to find against the one should release the other . . ." and "appellant here waived his right . . . by failing to ask the jury be sent back to complete its verdict . . ."

"The average juror apparently cannot decide cases on the evidence. He cannot see the cause as the primary element nor come near doing so in the great majority of cases. It cannot be true that corporations are wrong 90 per cent of the time." Kingdom, *True Verdicts*, (1940) 23 J. AM. JUD. SOC. 190.

⁴⁸ Sixty-three cases on "wilful misconduct" alone, in such a short time, indicates a high price is being paid for appellate court control. The small part played by the trial court is shown by the fact that out of the one hundred and three cases on "gross negligence" and "wilful misconduct" the granting of a motion for nonsuit was affirmed in only ten cases. Considering the nature of the standard in question this number seems very small.

⁴⁹ "Gross negligence" defined in *Krause v. Rarity*, 210 Cal. 644, 293 Pac. 62 (1930). "Wilful misconduct" defined in *Howard v. Howard*, 22 P. (2d) 279 (Cal. App. 1933) and in *Turner v. Standard Oil Co.*, 134 Cal. App. 622, 25 P. (2d) 988 (1933).

the instructions; and yet in the eyes of the appellate courts, "Seldom has a record come before us which shows so much care on the part of the trial judge."⁵⁰ A false sense of security, of certainty, seems to prevail after two or three courts have created a definition. Witness the statement that, "'Wilful misconduct' has been so frequently defined in recent decisions that its definition cannot now be regarded as in doubt."⁵¹ Inefficiency and irresponsibility on the part of both trial and appellate courts is the consequence of such appellate court dependence upon the delusive control given by the right to define. Definition is but an aspect of successful articulation of general standards by appellate courts; and it is one of the simpler aspects.

This attitude may also explain the lack of interest in the holdings of other states. Very few cases were cited from other jurisdictions; they were said to be "of slight value since predicated on statutory definitions different from our own."⁵² It is nevertheless true that the guest statutes of other states were intended to accomplish the same result intended by the California legislature. Considered as a problem of defining a specific statutory standard, the work of the courts with respect to guest statutes is easier, and hence more appealing, than when viewed as a problem of procuring a specified result.

The fate suffered by the "gross negligence" statute at the hands of the California courts exhibits a reluctance upon the part of appellate courts to accept responsibility for articulating standards in a way which will be effective in the disposition of cases. An aversion on the part of

⁵⁰ *Browne v. Fernandez*, 140 Cal. App. 639, 36 P. (2d) 122 (1934).

⁵¹ *Meek v. Fowler*, 35 P. (2d) 410 (Cal. App. 1934), *rev'd*, 45 P. (2d) 194 (Cal. 1935).

⁵² *Walters v. DuFour*, 22 P. (2d) 259, 262 (Cal. App. 1933); *Illingsworth v. Boyd*, 36 P. (2d) 659 (Cal. App. 1934).

appellate courts to concentrating any part of the power of decision in trial courts also appears. However, the attitude of some of the courts in construing the phrase "wilful misconduct" indicates that it is possible for the legislature to make its intention so well known that the courts will revise their normal procedures to effect the realization of that intention. Yet the part which the trial court is supposed to take in this revised procedure has been poorly outlined. If the discussions found in the opinions on "gross negligence" and "wilful misconduct" are any criterion, it is manifest that the courts do not understand clearly the nature of the task which is theirs when they attempt to articulate general standards of conduct.

That difficult task is the development of guides for trial courts in directing verdicts. This requires conscious effort on the part of the appellate court to find a basis for classification of the cases. They must be fitted into a pattern with a clear indication of the factual elements which make it appropriate to classify them one way or the other. This will call for careful analysis and statement of the facts, regardless of the final disposition which the appellate court makes of the case.

In order to create a pattern for the cases it should not be necessary for the appellate court to write opinions in very many cases. The importance of the problem involved and the effectiveness with which careful appellate supervision can accomplish greater justice should be dominant considerations in determining this question. For example, "wilful misconduct" cases could be handled quickly and fairly by trial courts if these courts were given the key by one or two appellate court opinions and urged to exercise a wider discretion in directing verdicts than they otherwise would dare to. The line between wilful misconduct and negligence is not a line which will ever be drawn with preci-

sion.⁵³ Frequent opinions defining wilful misconduct cause delay without contributing very much to the predictability of the law on the subject.

The framework for the cases should be designed so that it will delineate for the trial court the general sphere within which it can, without fear of reversal, make a determination of the facts for the purpose of securing decision according to established norms. This will require radical revision of common conceptions concerning the function of a motion for a directed verdict.

⁵³ "Notwithstanding the difficulty of drawing the line between negligence and reckless conduct, these differences make it advisable to treat the two subjects separately." RESTATEMENT, TORTS (1934) § 282, special note.

"The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of risk, but this difference of degree is so marked as to amount substantially to a difference in kind." RESTATEMENT, TORTS (1934) § 500, comment g.